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Supreme Court, U.S.
FILED
AUG 3 - 2009
OFFICE OF THE CLERK

No. 08-1572

IN THE
Supreme Court of the United States

PETER HOFFMAN, CINEVISIONS, SEVEN ARTS PICTURES INC., SEVEN ARTS FILMED ENTERTAINMENT LIMITED AND SEVEN ARTS PICTURES PLC,
Petitioners,

v.

JONESFILM,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

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REASONS FOR GRANTING THE PETITION

Virtually none of Respondent Jonesfilm's arguments in its Brief in Opposition to the Petition for Writ of Certiorari is directed to addressing the substantial reasons that Petitioners have raised for granting certiorari on the questions presented for review. Jonesfilm does not dispute the importance of these issues for providing litigants with much-needed clarity on matters of third party arbitral jurisdiction and standards for *vacatur* of arbitral awards – and, in particular, on whether state or federal standards should govern those determinations. Nor does Jonesfilm dispute that these are issues on which this Court has not yet spoken. Moreover, Jonesfilm does not even address the direct and substantial conflicts on these matters between the Circuit Courts of Appeals detailed in Petitioners' opening brief.

Jonesfilm's arguments mostly raise issues of fact that have little, if any, bearing on the fitness of the issues for review, and its scant legal arguments merely demonstrate the confusion that persists on the issues on which Petitioners have requested review. The petition for a writ of certiorari should be granted for the reasons stated herein and for those stated in Petitioners' opening brief.

A. Standards For Determining Arbitral Jurisdiction Over Non-Signatories

The principal reason asserted by Respondent for denial of the Petition on the issue of arbitral jurisdiction over non-signatories is a factual argument that certain provisions of the Jonesfilm/NTTS Assignment somehow automatically require that all the "Hoffman companies" (a misleading placeholder that attempts to lump all of

the Petitioners together) are bound to accept an arbitration clause in the Jonesfilm/NTTS Assignment to which none has agreed.

The issue before this Court is not what the factual record establishes, but what is the proper law to be applied: California law (as chosen by the Jonesfilm/NTTS Assignment) or federal common law (on which the Court of Appeals relied). Jonesfilm's reliance on various *federal* authorities applying "equitable estoppel" to establish arbitral jurisdiction against non-signatories is unavailing.[1] As Petitioners have argued, California state law, not federal law, should govern this determination.

Repondent's characterizations of California law are also inaccurate. Petitioners' authorities, which Jonesfilm does not address, establish that California law does not authorize arbitral jurisdiction on the facts *sub judice* – *i.e.*, when "equitable estoppel" is used to establish arbitral jurisdiction against a non-signatory. *See* Petition at 14-15 and authorities cited therein. None of the cases cited by Respondent purport to overrule these clear principles.

Jonesfilm's reliance on Sections 1589 and 3521 of the California Civil Code is also misplaced. Jonesfilm fails to cite the most important case defining the reach of those sections in the context presented here, where an alleged assignee of motion picture rights (CineVisions) is claimed to be held liable for contractual commitments of its assignor (NTTS). *See*

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[1] The California case of *Metalclad Corp. v. Ventana Environmental Work Partnership*, 109 Cal. App. 4th 1705, 1714-15 (2003), also involved application of federal not California law and is irrelevant for that reason.

Recorded Picture Company [Productions] Limited v. Nelson Entertainment, Inc., 53 Cal. App. 4th 350 (1997) ("Nelson"). Under *Nelson*, only if *all* NTTS rights under the Jonesfilm/NTTS Assignment – *i.e.*, all sequel rights to the Original Picture owned by NTTS – were assigned to CineVisions would CineVisions be required under California law to assume any of NTTS' obligations to Jonesfilm. *Id.* at 361-64. No such complete assignment occurred, as all later sequel rights were retained by NTTS after the Jonesfilm/NTTS Assignment (and were later assigned by NTTS to a third party). As *Nelson* states:

> We decline to adopt the rule proposed by the producers – that a company must comply with a contract to which it is not a party if it has accepted even a portion of the benefits of that contract through a subsequent, separate agreement with one of the original contracting parties. Such a rule would lead to absurd consequences. . . . We reject this illogical and unjust result.

Id. at 363.

Jonesfilm also misstates the terms of the Jonesfilm/NTTS Assignment, the distribution agreement between CineVisions and NTTS, and the later assignments of those distribution rights to two other Petitioners. None of these assignments included any assumption by any party of NTTS' obligations to Jonesfilm under the Jonesfilm/NTTS Assignment. And no such assignments were ever made to Petitioners Hoffman or Seven Arts Pictures plc – both of whom the Court of Appeals held subject to an arbitration agreement in the Jonesfilm/NTTS Assignment that neither of them executed, despite

the fact that neither ever received an assignment of any distribution rights thereunder.

Jonesfilm also makes the false claim (repeated by the District Court) that in Petitioners' original declaratory relief complaint commencing this action (based on diversity, not Federal question jurisdiction), Petitioner sought to enforce the Jonesfilm/NTTS Assignment. Petitioners' complaint on its face was based solely on the distribution agreement between NTTS and CineVisions, *not* on the Jonesfilm/NTTS Assignment.

But all of these are matters to be addressed at the merits stage, or by the lower courts on remand when they will have the opportunity properly review California law and apply it to the specific facts of this case. These issues have no bearing on the merits of the Petition before the Court.

Finally, Jonesfilm persists in the legally erroneous argument that a district court must defer to an arbitrator's determination regarding the extent of his jurisdiction. This is not the law. *See First Options of Chicago v. Kaplan*, 514 U.S. 938, 944 (1985); *Hawsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79 (2002). Indeed, under California law, a party has a right to *jury trial* to determine whether a particular issue is subject to arbitration, as well as whether a party has agreed to arbitration. *See Rosenthal v. Great Western Financial Securities Corp.*, 14 Cal. 4th 394, 405-07 (1996).

The issue Petitioners have raised regarding whether state or federal standards should be used to determine arbitral jurisdiction over non-signatories to an arbitration provision is important and novel. As stated in the Petition, the Courts of Appeals have

reached widely divergent conclusions on this issue. The Court should grant review of this issue.

B. Standards For *Vacatur*

Jonesfilm's arguments regarding the standards for *vacatur* of arbitral awards (Petitioners' second and third questions presented for review) do not even address those standards. Instead, Jonesfilm merely repeats its assertion that Petitioners are not entitled to assert any basis for *vacatur* because they did not file a "statement of defense" in the arbitration. This argument is erroneous.

Importantly, Jonesfilm cites no provision of the IFTA Rules to support this claim because there are no such provisions.

Moreover, Petitioners in fact filed lengthy written objections in the arbitration proceedings, and specifically raised the issues on which they here assert the arbitration award should be vacated (with the exception of the erroneous award of attorneys fees, which could not have been raised in the arbitration because it occurred at the close of the arbitration). There is no basis for Jonesfilm's claim that Petitioners did not raise these defenses. Petitioners have repeatedly raised these issues at every stage of the proceedings: before the arbitrator, before the District Court, and before the Court of Appeals.

Indeed, the arbitrator himself never suggested on the record or otherwise that he had rejected Petitioners' defenses because they were not included in a "statement of defense" (and certainly never cited any purported IFTA Rules to that effect). Unlike the District Court and the Court of Appeals, the

arbitrator's rulings were premised on a rejection of Petitioners' arguments on the merits, not on a refusal to consider the arguments in the first instance. Petitioners contend that the arbitrator's rulings exceeded his authority and should be vacated (as stated in the Petition). But the extraordinary claim that a party cannot assert that an arbitrator exceeded his powers (or request review of the standard for *vacatur* in this Court) unless it has effectively conceded arbitral jurisdiction by filing a "statement of defense" in the arbitration proceedings should be rejected. There is no basis in law or in the IFTA Rules for such a contention.

CONCLUSION

Petitioners respectfully request that the Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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